No. 87-1656

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CONSOLIDATED ALUMINUM CORPORATION,
Petitioner

v.

C.F. BEAN CORPORATION, BEAN DREDGING CORPORATION, AMERICAN EMPLOYERS INSURANCE COMPANY, OCEAN MARINE INDEMNITY COMPANY, LTD., ST. PAUL FIRE AND MARINE INSURANCE COMPANY, HIGHLAND INSURANCE COMPANY and ARKWRIGHT-BOSTON MANUFACTURERS MUTUAL INSURANCE COMPANY
Respondents.

Brief in Opposition to Petition for Certiorari by Respondents C.F. Bean Corporation, Bean Dredging Corporation, American Employers Insurance Company, Ocean Marine Indemnity Company, Ltd.

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Company, Ocean Marine
Indemnity Company, Ltd.

RESTATEMENT OF THE ISSUE PRESENTED

The court of appeals and the district judge have both held that Respondent (Bean) could not have anticipated that its failure to follow safe dredging practices would result in physical damage to the equipment and work in process at Consolidated's (Petitioner's) aluminum plant. The harm suffered by Consolidated, as found by the trier of facts in a traditional tort risk-duty context, and affirmed by the Fifth Circuit, was not of the general sort that one would expect to follow from failing to dredge carefully near a gas pipeline located six and one-half miles away from Consolidated's plant.

The only issue, therefore, is:

> Whether Bean's conduct created a foreseeable risk of harm to the plaintiff. Both lower courts held it did not.

The classic rule of non-liability for consequential damage arising from negligent interference with the unknown contract of another was transcended here by introducing the rather bizarre element of physical damage superimposed on pure economic loss, thus pitching this case into the more mundane arena of traditional tort law. See *Consolidated Aluminum Corp. v. C.F. Bean Corp.*, 772 F.2d 1217 (5th Cir. 1985), *Pet. App.* C-16, 17.

DISCLOSURE OF PARTIES TO THE PROCEEDINGS

Rules 21(b) and 28.1

Pursuant to Rule 21.1(b), counsel for Respondents points out that all the parties to the proceedings below are not contained in the caption of the petition. Parties appearing below included Texaco, Inc. and the United States of America, by and through the Corps of Engineers, neither of which are interested in Consolidated's petition to this Court. All other parties are correctly named in the caption of the petition and hereto.

Pursuant to Rule 28.1, Respondent Bean Dredging Corporation discloses that its parent is C.F. Bean Corporation, also a party hereto, and that Bean Services Corporation and Volker Stevin U.S. Corp. are parent and affiliated corporations.

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Respondents.

Brief in Opposition to Petition for Certiorari by Respondents C.F. Bean Corporation, Bean Dredging Corporation, American Employers Insurance Company, Ocean Marine Indemnity Company, Ltd.

Respondents (Bean) respectfully request that this Court deny the petition by Consolidated Aluminum Corporation (Consolidated) for writ of certiorari seeking review of the Fifth Circuit's opinion in this case.

Reasons Why the Petition Should be Denied

Statement of the Case

Consolidated's version of the facts material to this case neither conveys nor portrays a complete picture. Therefore, to put the matter in its proper perspective, Bean deems it necessary to amplify briefly the statement of the case provided by Consolidated.

The pipeline struck and ruptured by Bean's dredge crossed beneath the Calcasieu River (Lake Charles) Ship Channel. That pipeline, referred to as the PPG (Pittsburgh Plate Glass) feeder, served to deliver natural gas from Texaco's main Evangeline supply line directly to PPG's plant in Lake Charles.[1]

The pipeline itself was identified in Bean's dredging contract with the Corps of Engineers as one of no less than

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1. Texaco's gas distribution system is depicted on a schematic diagram prepared by Texaco and identified as *Exh.* PX-10, copy of which is attached as an appendix hereto. Texaco's PPG feeder was built in 1963. *Exh.* PX-43. The Evangeline Pipeline, which terminates at the eastern (southern) bank of the Calcasieu River, was built in 1952. The Evangeline line connected to a number of Texaco's producing fields in south Louisiana. When Texaco eventually tied in the Evangeline line, this greatly enhanced Texaco's ability to provide gas in Lake Charles, providing Texaco with the opportunity to expand its market in the area. The subsequent marketing effort by Texaco eventually led to the gas sales agreement with Consolidated. *Consolidated*, 639 F.Supp. 1173, 1176 (W.D. La. 1986), aff'd 833 F.2d 65 (5th Cir. 1987), also at Petitioner's Appendix, (*Pet. App.*) B-3 and B-4. See also *Exh.* PX-10 and PX-27.

twenty pipelines which crossed beneath the Calcasieu River and within the area where Bean was to dredge. It should be noted that nothing in the Corp of Engineers' documents or drawings connect that Texaco pipeline to anything or to anyone (except Texaco). 639 F.Supp. at 1177, *Pet. App.* B-5-6. Neither Bean nor its employees had any knowledge of the contract between Texaco and Consolidated. Nor did Bean or any of its employees have any knowledge of Consolidated or its fragile aluminum processes. 639 F.Supp. at 1182-83, *Pet. App.* B-20-21. Nothing about the pipeline suggested in any way the prospect of physical damage to an industrial plant.

The Consolidated plant did not lie anywhere near the limits of Bean's dredging work as established by the Corp of Engineers. Consolidated's plant was situated on an entirely different body of water, the Lake Charles Industrial Canal, and was not even adjacent to the river or channel in issue. If fact, no portion of Consolidated's property adjoined the Calcasieu River channel. *Exh.* PX-48, *Tr.* V. 12 at 635. Consolidated's plant was located approximately *six and one-half miles* from the location of the rupture in Texaco's PPG feeder line. 639 F.Supp. at 1183, *Pet. App.* B-21.

Texaco and Consolidated had entered into a Gas Sales and Purchase Agreement in 1968. Though calling for delivery of a minimum volume and pressure of gas each day, the contract also contains a force majeure provision excusing either party from any liability for "breakage or accident to . . . lines of pipe [and] temporary failure of gas supply". *Exh.* PX-29, p. A-17.

The actual delivery of Texaco's gas to Consolidated came predominantly from the Evangeline pipeline, through "Point C", a gathering platform in the marsh south of Lake Charles, and then by single pipeline directly to Consolidated's

plant. With no other arrangements than these, Consolidated's Lake Charles plant became the only aluminum plant ever built with no back-up or secondary source of power whatsoever. In that regard Consolidated's plant was unique in the aluminum industry; no other aluminum reduction plant is fed with power from only one source and direction. The arrangement for one-source gas delivery proved to be a hopelessly inadequate situation in which to operate an aluminum plant. 833 F.2d at 66, *Pet. App.* A-3; 639 F.Supp. at 1179, *Pet. App.* B-12, 13.

Consolidated's management, however, thought Texaco's gas system generally reliable, they never did bother to evaluate the risks to the plant in the event of an interruption at any point in Texaco's pipeline system. *Tr.* V. 14 at 1024-25, 1032-33, 1043. It was never even considered that a rupture in any of the pipelines crossing the Calcasieu River would result in a shutdown of the Lake Charles plant (*Tr.* V. 14 at 858), much less cause any of the "physical" damages which subsequently arose.[2]

To effect the repairs to the line, Texaco was required to close a block valve at Jennings, La., more than thirty miles distant. This terminated the gas flow in the Evangeline pipeline. Texaco had no means at the time by which to isolate the PPG feeder. The entire distribution system to Lake Charles, and not just PPG, was thereby affected. 639

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2. If Consolidated's management did not see the risk in shutting down its own plant as a result of activities in the Lake Charles Ship Channel, it is difficult to see how Bean should have foreseen, from its position as a dredging contractor on a different body of water (more than six miles away), what Consolidated failed to see right in its own back yard and in a situation immediately familiar to Consolidated. Yet, incredibly, Consolidated appeals to this Court to find that parties like Bean should be held liable as a matter of law.

F.Supp. at 1180, *Pet. App.* B-14, 15. Consolidated was fed with a minimal amount of gas from Texaco's Big Lake or Hackberry Field, approximately 3.5 million cubic feet per day, an amount insufficient to run Consolidated's plant. *Exh.* PX-27. Operations at Consolidated promptly ceased, and the physical damage ensued.

Consolidated at trial introduced expert testimony on the nature of industry in Lake Charles. Its expert, Mr. Norman Terry, having conducted a study of how each plant obtained its raw material and energy needs, certainly possessed unique knowledge on the interdependency of industry in the area.[3] But Consolidated's own expert, in spite of his vast knowledge on the subject, had no idea where any of the products in any of the pipelines went or whom they served; *Tr.* V. 12 at 628-31. He did know that ***all*** industrial plants in Lake Charles had a back-up or secondary source of power available to them, *Tr.* V. 12 at 634, and the most he could say about the effect of an interruption in any one pipeline was that anything was possible and nothing would "surprise" him. *Tr.* V. 12 at 638-40, 641.

After considering all the evidence on the matter, the district judge held that there was nothing to even suggest that Bean should reasonably have anticipated that a rupture of the Texaco pipeline would cause physical harm to the petitioner's remotely located aluminum plant. 833 F.2d at 68, *Pet. App.* A-7; 639 F.Supp. at 1182-83, *Pet. App.* B-20, 21. On appeal, the Fifth Circuit agreed and affirmed, finding no error in any of the factual (clearly not erroneous) or legal

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3. This study was made in conjunction with the U.S. Department of Energy's Strategic Petroleum Reserve Project. *Tr.* V. 12 at 617. Consolidated made no effort to show what a dredging contractor knew or should have known about the remote effects of a rupture in a pipeline.

conclusions in the trial court's opinion. 833 F.2d at 68, *Pet. App.* A-8.

I. There is no conflict between the Fifth Circuit's Decision in *Consolidated* and the Decisions in any Other Circuit.

Contrary to Consolidated's assertions, the opinion in this case does not conflict with any other admiralty decisions. Consolidated argues, erroneously, that the cornerstore of the Fifth Circuit's decision is the inability of a "reasonably thoughtful person" to have anticipated the "precise sequence of events" flowing from the negligent act. *Consolidated's Petition*, p. 5. But nowhere in the Fifth Circuit's opinion is such a requirement stated; the only requirement is that the harm be of "a general sort" that a reasonably thoughtful person might anticipate. 833 F.2d at 68. *Pet. App.* A-7.

After noting the discussions of foreseeability by eminent commentators[4], as well as the basic requirements of foreseeability found in a former Fifth Circuit case which relied on a decision of this Court,[5] the Fifth Circuit went ahead

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4. 833 F.2d at 67, *Pet. App.* A-4-7. See, e.g. Green, *Proximate Cause in Texas Negligent Law*, 28 Tex. L. Rev. 775 (1950); *Prosser and Keaton on Torts, Duty* §53 (5th Ed. 1984); Harper, James and Gray, *The Law of Torts, Scope of Duty in Negligence Cases* §18.2 at 655 (2nd Ed. 1986); Malone, *Ruminations on Cause-in-Fact*, collected in his *Essays on Torts*, p. 172 (1985), 9 Stan. L. Rev. 60 (1956); F. James and R. Perry, *Legal Cause*, 60 Yale L. J. 761, 786 (1951); Harper, *The Foreseeability Factor in Law of Torts*, 7 N.D. Law. 468, 482 (1932).

5. *Republic of France v. United States*, 290 F.2d 395, 401 (5th Cir. 1961), quoting *Dalehite v. United States*, 346 U.S. 15, 42, 73 S.Ct. 956, 971, 97 L.Ed. 1427 (1953); as well as listing several accepted definitions by numerous courts as found in *Words and Phrases, Foreseeability*. 833 F.2d at 67 n. 1, *Pet. App.* A-5.

and distilled the following generalized statement regarding the foreseeability of harm:

> "We perceive a harm to be the foreseeable consequence of an act or omission if harm of a general sort to persons of a general class might have been anticipated by a reasonably thoughtful person, as a probable result of the act or omission, considering the interplay of natural forces and likely human intervention." 833 F.2d at 68, *Pet. App.* A-7.

The Fifth Circuit's formulation, quoted above, captures the classic tort definitions of foreseeability. It hardly differs from the principles as espoused by legal scholars and eminent jurists over the past hundred years.

Applying that definition to the facts in this case, the lower courts found that Bean could not possibly have anticipated that its failure to follow safe dredging practices would likely result in physical damage to an aluminum plant located more than six miles away and on a different body of water. That was simply not the type of general harm expected to follow from respondent's dredging operations. In fact, the harm in this case was simply inconceivable; even Consolidated's own management never thought it was possible.

These considerations display, contrary to the assertions of Consolidated, that the Fifth Circuit addressed the issue from the standpoint of whether *any* harm to Consolidated was foreseeable; and agreed with the trial judge that it was not.

By way of contrast, the cases relied upon by Consolidated in its effort to engineer a conflict between the circuits, i.e., *Petition of Kinsman Transit Co. (Kinsman I)*, 338 F.2d 708 (2nd Cir. 1964), *cert. denied* 380 U.S. 944 (1965), and

Pastore v. Taiyo Gyogyo, K.K., 571 F.2d 777 (3rd Cir. 1978), are simply not on point. Both those cases dealt with exact manner and extent of harm; they do not address the question of whether any risk of harm was foreseeable or not. They are, therefore, distinguishable.

In *Kinsman I*, for example, the plaintiffs were riparian property owners who suffered injury when a vessel broke free from her moorings and drifted downstream. It was never disputed that the shipowner owed a duty to the downstream property owners to moor his vessel properly and safely. The general type of harm meaning the risk of damage to downstream property owners, was always present and never questioned. *Kinsman*, 338 F.2d at 722-23, 724.

In *Pastore*, the Third Circuit employed a slightly different analysis. But the Third Circuit, like the Second Circuit in *Kinsman*, first decided that some general harm was reasonably to be anticipated. The plaintiff in *Pastore* was a fireman who was injured when he fell from a ladder in one of the vessel's cargo holds. The ladder had been positioned on what appeared to be part of the deck but was actually a tarpaulin covering some frozen cargo. The crew members and the stevedores were present when the ladder was so placed, but no one warned the firemen when they subsequently arrived to fight a fire in the hold. The defendants were well aware that the cargo hold was deceptive in appearance, possibly inviting tragedy to the unwary visitor. In that fashion, the stevedores' careless cigarette smoking did more than set the stage for the fireman's presence. "The possibility (that) the fireman would fall because of unfamiliarity with conditions cannot be said to be so unusual as to sustain the district court's ruling that there was no proximate causation as a matter of law." *Pastore, supra*, 571 F.2d at 782. The risk of harm to someone falling from a precarious but deceptively placed ladder is obvious. The risk of harm to a remotely situated aluminum plant is a different matter altogether.

In both *Kinsman* and *Pastore*, the harm eventually suffered was precisely the sort of harm which might have been anticipated by a reasonably thoughtful person, even if the exact method and extent of harm might not have been so easily ascertained.

However, the facts of the instant case compel a different result. How could the operator of a dredge working in a navigable channel near PPG's plant possibly have foreseen that its unintentional severing of a gas pipeline lying beneath the bottom of the river would cause physical damage to an aluminum plant more than six miles away. It stretches imagination to the extreme to argue that respondents could have foreseen that an interruption of a gas pipeline in Louisiana would cause any harm, much less physical harm, to Consolidated's equipment and processes. Every judge who considered this question decided that the risk of harm was simply too remote or too indirect to justify the imposition of liability on Bean.[6]

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6. PPG's plant also went without its supply of natural gas from Texaco when the pipeline was severed. Suit was filed by PPG against Bean in state court. Exceptions were granted in favor of Bean, which decision was affirmed by the Supreme Court of Louisiana. *PPG Industries, Inc. v. Bean Dredging Corp.*, 447 So.2d 1058 (La. 1984). In that case, the seven justices on the Louisiana Supreme Court agreed that the particular risk at issue here, the risk of shutting down the plaintiff's factory, was not encompassed by Bean's duty of care not to damage pipelines negligently. *PPG Industries*, 447 So.2d at 1059-60. The Louisiana Court's analysis is of interest. The Louisiana justices examined the case in light of traditional tort principles, applying a duty-risk analysis. The court considered PPG's losses as "indirect", and observed there was clearly an ease of association between the rule of law imposing a duty not to damage property belonging to another and the risk of injury sustained by Texaco, but that duty did not extend to the "risk that a third-party who has contracted with the owner of the injured property will thereby suffer economic loss." *PPG Industries*, 447 So.2d at 1061. Consolidated's harm was even more peculiar

The decision of the trial judge is correct. The petition for certiorari should not entertained.

II. There is no Analytical Confusion Regarding Duty and Foreseeability

Consolidated relies on isolated and selected readings of the ***Restatement (Second) of Torts*** to suggest that the Fifth Circuit and the district judge were somehow confused with the concepts of foreseeability and causation. There is simply no support for this accusation. Nor is there a conflict between the ***Restatement of Torts*** and the lower courts' treatment of the case.

The ***Restatement*** also requires that the risk of some general harm to the plaintiff be established first. In other words, this is the establishment of a duty, the determination of which is guided by the general priciples of tort law.

It is well established that a tortfeasor "is accountable only to those to whom a duty is owed". 833 F.2d at 67. *Watz v. Zapata Offshore Co.*, 431 F.2d 100 (5th Cir. 1970); 57 *Am. Jur.* 2nd *Negligence* §33 (1971). The determination of that duty involves a number of considerations, including, most notably, the foreseeability of the harm suffered by the complaining party. 833 F.2d at 67. *Prosser and Keaton on Torts, Duty* §53 (5th Ed. 1984); Green, *The Duty Problem in Negligence Cases*, 28 Col. L. Rev. 1014 (1928). In this fashion, the Restatement approach is in perfect harmony with the Fifth Circuit's analysis.

The ***Restatement (Second) of Torts*** §281 (b) notes that an actor is liable to another if his conduct "is negligent with

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6. (Continued)
and was not expected by anyone. The consequence of physical harm to Consolidated was, at best, inconceivable.

respect to the other". The comments to this clause, partially quoted above, explain further:

> "If the actor's conduct creates such a recognizable risk of harm only to a particular class of persons, the fact that it in fact causes harm to a person of a different class, to whom the actor could not reasonably have anticipated injury, does not make the actor liable to the person so injured." ***Restatement***, *supra;* comment c.

Considering the principle stated above, it follows that a breach of Bean's duty not to damage pipelines negligently would create a recognizable risk of harm to the pipeline owner, but Consolidated is unquestionably of a "different class". Consolidated is not a pipeline owner. Consolidated owned no property anywhere near the PPG pipeline. Consolidated does not even belong to the class of riparian property owners, like PPG, located along the banks of the channel near the Texaco PPG line.[7]

In these circumstances, as both the ***Restatement*** and the courts below recognize, the fact that Bean's conduct caused harm to a person of a "different class", i.e., Consolidated, *to whom Bean could not have reasonably have anticipated injury*, does not make Bean liable.

The illustrations given by the ***Restatement*** in support of this principle are derived from *Palsgraf v. Long Island R. R.*, 162 N.E. 99, 248 N.Y. 339, 59 A.L.R. 1253 (N.Y. 1928). Here, as in *Palsgraf*, we have the same problem of geographical remoteness. We have an unforeseeable plaintiff.

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7. Consolidated is in a class of its own because of its reliance on only one pipeline, with no back-up or secondary source of power whatsoever, but that is another matter.

We have unforeseeable consequences. But in this case, unlike *Palsgraf*, we have Consolidated's damage occurring only because Texaco failed to deliver the gas as required by the contract. It was only after the "contracted-for" gas failed to arrive that the events at Consolidated's plant began to unfold. There was nothing to suggest in any way that a rupture of Texaco's pipeline would interrupt Consolidated's gas delivery and cause physical harm to a plant, located more than six miles away, on a different body of water.

The illustrations in the ***Restatement*** make it clear that the question of whether or not Bean is negligent toward Consolidated turns on whether Bean could have reasonably anticipated the risk of harm to someone like Consolidated, which, of course, it could not have. The evidence clearly demonstrated that Consolidated's peculiar harm was not expected by anyone.

Thus, missing from this case is any factual reason for embarking on Consolidated's rather novel "hindsight" approach to legal cause. The lower courts' determinations of whether the consequence of Bean's negligence was foreseeable by a reasonably thoughtful person is in line with the ***Restatement*** and contemporary legal thought. Indeed, the Fifth Circuit went to great lengths to consider this case in light of prominent legal teachings. *See* 833 F.2d 67-68 and authorities cited therein.

The issue of Bean's reaponsibility was properly decided by the district judge, and those findings and conclusions were correctly affirmed by the Fifth Circuit. Consolidated's arguments to the contrary are without merit.

The petition should be denied as it fails to raise any issues pertinent to the jurisdiction of this Court.

III. Consolidated's Invitation for This Court to Address the Standards of Legal Cause in a Maritime Tort Action is Inappropriate.

Consolidated's effort to have this court enunciate standards to be applied in a legal cause determination is tantamount to reinventing the wheel. The questions of duty and foreseeability, including causation, have been developed and applied by state and federal courts for hundreds of years. A wealth of knowledge and precedent exist by which the lower courts sitting in admiralty can be guided. No purpose would be served by this Court granting certiorari on the point.

Consolidated obviously raises this issue only insofar as it is necessary to its own claims and arguments. In *Layne & Bowler v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1920), this Court said, "it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is important to the public as distinguished from that of the parties . . .".

The issues which Consolidated raise are inherently factual in nature. The outcome of any tort case is fact-sensitive. Consolidated's invitation to set aside many of the lower court's findings and conclusions was rejected by the Fifth Circuit. That court found instead "no error in any factual finding or legal conclusion inherent in the trial court's ruling that the damages suffered by Consolidated were not foreseeable and, as such, not within the reach of the duty imposed on Bean to perform its dredging operations in a non-negligent manner." 833 F.2d App. at 68, *Pet. App.* A-8.

In view of the stated practice of according "great weight" to findings of fact which have been made by the district court and approved by a court of appeals, Consolidated's invitation for writs should be declined and its petition

denied. *See*, e.g., *N.C.A.A. v. Bd. of Regents of Univ. of Okl.*, 468 U.S. 85, 97-98, n.15, 104 S.Ct. 2948 (1984); *Branti v. Finkel*, 445 U.S. 507, 511-12, n.6., 100 S.Ct. 1287 (1980).

The district judge and the Fifth Circuit, in analyzing this case as they did, spoke as a single voice. Their treatment of the issues was proper and in line with convincing precedent. No showing is made that the result would be any different in another circuit. There is no necessity for concluding, as Consolidated suggests, that the Fifth Circuit decided important questions of admiralty law which should be settled by this Court. cf. *Rice v. Sioux City Memorial Park Cemetery Inc.*, 349 U.S. 70, 74, 75 S.Ct. 614 (1955).

Conclusion

Consolidated has had every opportunity to persuade the trier of fact that its peculiar and remote harm was the foreseeable result of Bean's dredging. Consolidated has fought the good fight, but has lost.

In light of the foregoing reasons, Consolidated's Petition for Writ of Certiorari should be denied, and this protracted litigation finally brought to an end.

Respectfully submitted,

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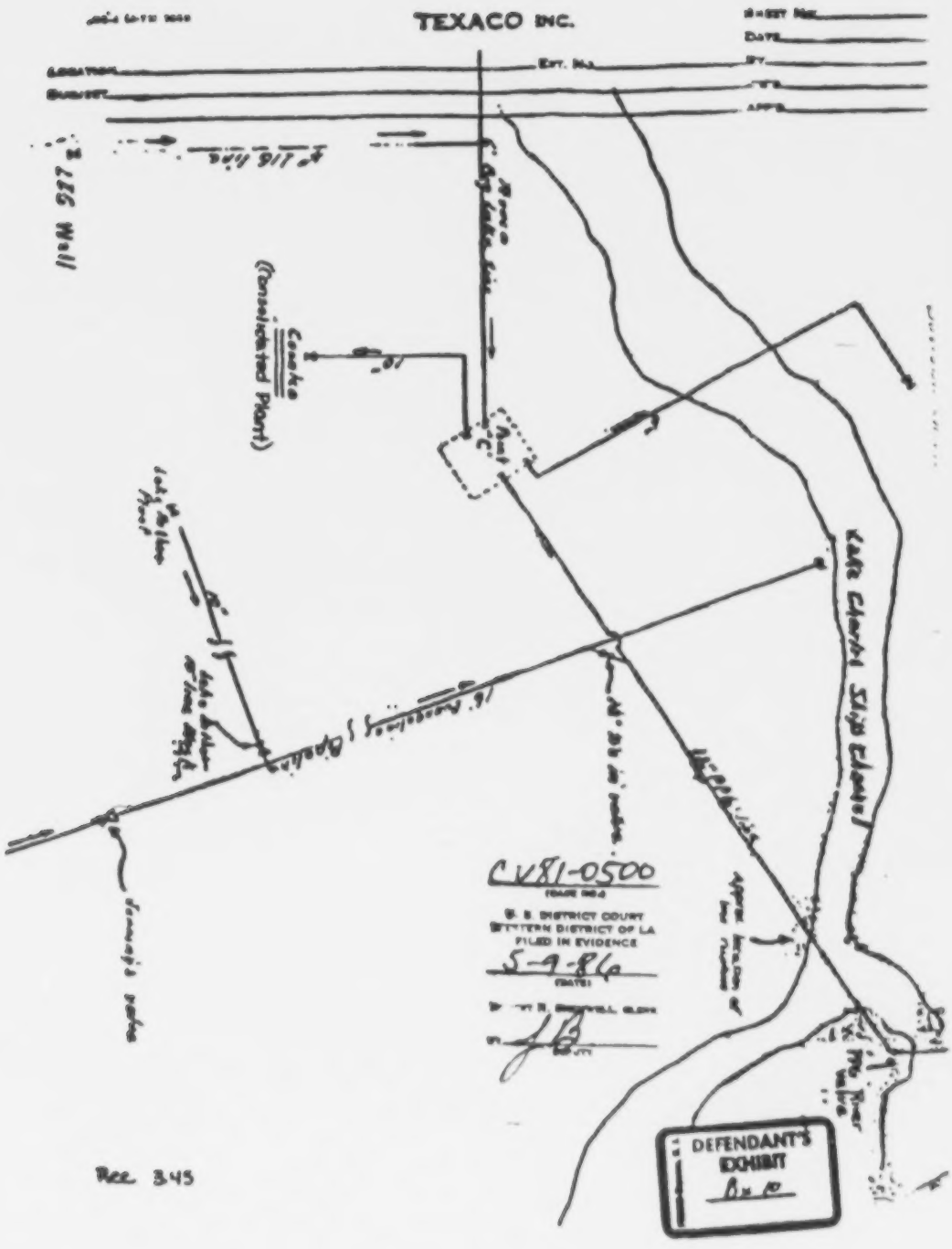
APPENDIX


TEXACO INC.
Cocoa
(Consolidated Plant)
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EASTERN DISTRICT OF LA
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DEFENDANT'S
EXHIBIT
Rec. 345